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# OSHA CURRENT CLIMATE & KEY ISSUES in 2019 & Beyond

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# OSHA TODAY

- **Current Leadership**
  - **No Confirmed Assistant Secretary of Labor (Head of OSHA)**
  - **Scott Mugno – Nominee since October 2017 – Restarted confirmation process in January 2019**
  - **Loren Sweatt – Acting Deputy Assistant Secretary**
  - **3 Review Commissioners**
    - **James Sullivan, Trump Appointee**
    - **Cynthia Attwood, Obama Appointee – term expires April 2019**
    - **Heather MacDougall, Chair since January 2017. Obama appointee in 2014, confirmed for second term in 2017. Surprisingly employer-friendly.**

# CURRENT ATTITUDE OF RANK & FILE UNDER TRUMP ADMINISTRATION

- Fewer High Dollar cases
- But routine inspections are continuing under penalty increases that began in 2016, when maximum statutory penalties were increased by about 80%
- Recent employer friendly court decisions

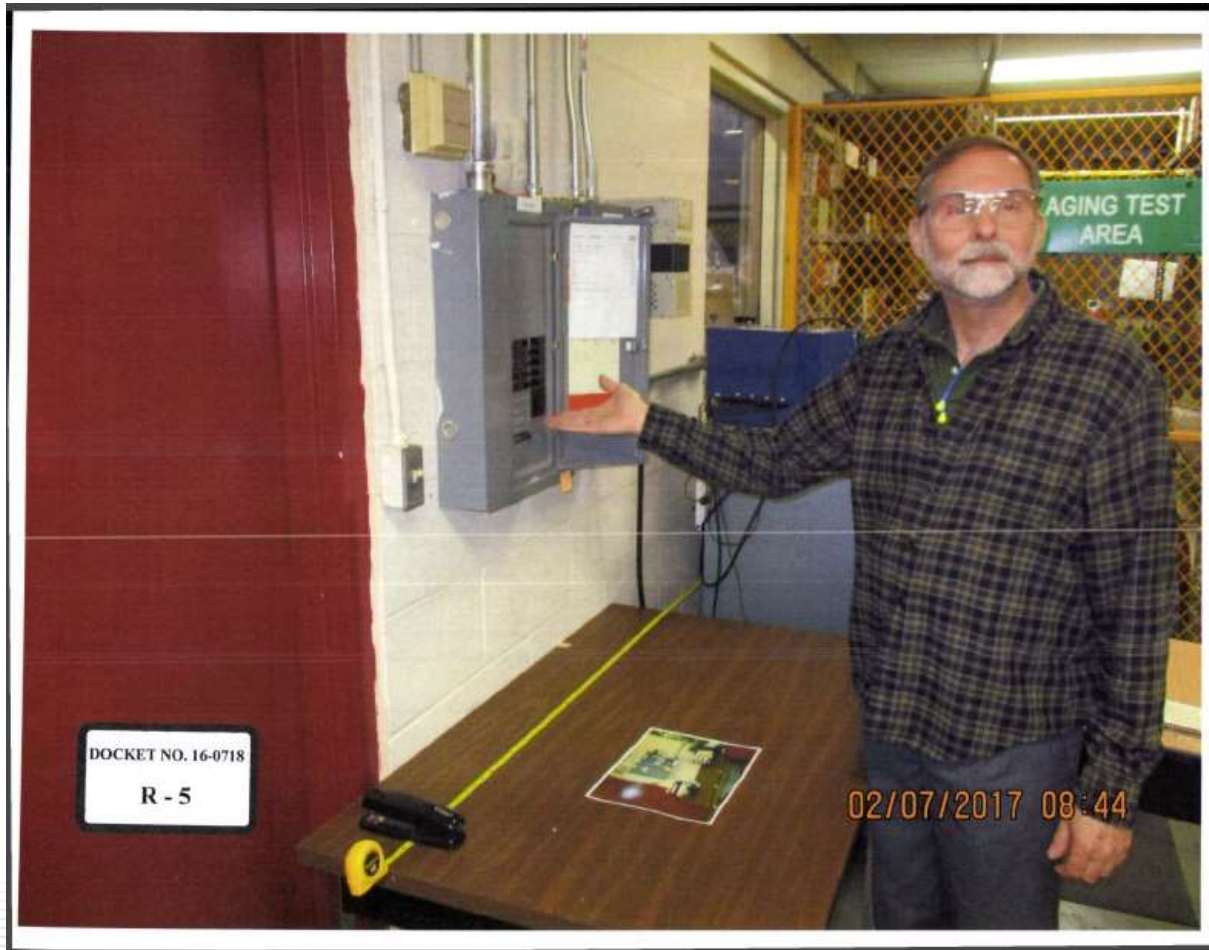
- **2016 Law increased max possible penalties as follows:**
  - Effective 1/23/19 Serious - \$13,260 Per Item (was \$12,934 in 2018, and \$7,000 until August 2016)
  - Other-Than-Serious - \$13,260 Per Item
  - Willful & Repeat - \$132,598 Per Item (was \$129,336 in 2018, was \$70,000 until August 2016)
  - Failure to Abate - \$13,260 Per Day
- **Will automatically adjust for inflation each year**

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# SOME OBSERVATIONS

- Employers, especially safety professionals, too deferential to OSHA – OSHA inspectors are just people
- During inspections, OSHA puts too much emphasis on formality of training and documentation – compliance as opposed to safety
- OSHA often takes position that documentation is required when it is not
- OSHA Directive (CPL 02-000-111 – 1995) re/paperwork citations

- **Directive – OSHA’s emphasis on paperwork undermines OSHA’s mission**
- **Directive – if employer complies with substantive elements but fails to document, such as certification, no citation will be issued**







# CITATIONS

- After inspection, citation may be issued
- Employer can try to resolve at informal conference, or appeal (contest) the citation, or both
- Informal conferences – like buying a car
- What will it take to make you go away?
- “This is as low as I can go”
- Contested cases are handled by DOL lawyers who are more receptive to legal defenses like employee misconduct

# OSHA INDUSTRIAL HYGIENE

- Do side-by-side sampling with OSHA
- If OSHA cites you for exceeding a PEL, always get the lab data package.
- Will have to contest to get that
- Recent Cases – Hex chrome, Silica & Lead –
  - OSHA IHs failed to follow proper protocol

# INSPECTIONS

- Employers have the right to require a search warrant from a federal judge before allowing OSHA to inspect
- Requiring a warrant can have negative consequences for the employer
- OSHA threshold for getting warrant is low

# INSPECTIONS (CON'T)

- When OSHA announces an inspection, best course is normally to negotiate limited scope inspection that will address OSHA's reason for being there

# RARE SEARCH WARRANT CASE

- **U.S. v. Mar-Jac Poultry, October 9, 2018 11<sup>th</sup> Circuit Court of Appeals (Florida, Georgia, Alabama)**
- **Arc flash injury reported to OSHA**
- **OSHA then came on-site to inspect**

# INSPECTIONS (Con't)

- **Mar-Jac provided OSHA 2013-15 OSHA logs**
- **Mar-Jac would only allow OSHA to inspect accident**
- **Once in the plant, OSHA decided it wanted to do wall-to-wall**
- **Mar-Jac said no to wall-to-wall**

- **OSHA applied to a federal judge for a search warrant.**
- **Judge issued search warrant**
- **Mar-Jac filed motion to quash**
- **Same judge that issued warrant then quashed it and ruled in favor of employer**
- **Judge held that injury logs did not provide probable cause to expand inspection beyond the injury**



- Court of Appeals agreed with trial court
- Mere fact that injuries occurred did not establish probable cause that a violation of an OSHA standard existed
- 29 CFR 1904 states that recording an injury or illness doesn't mean the employer was at fault or that standard was violated
- As such, recorded injuries or illnesses did not justify search warrant

# EMPLOYEE POST-ACCIDENT DRUG TESTING

- 29 CFR 1910.35(b)(1)(iv) prohibits employers from retaliating against employees for reporting injuries
- 2016 Preamble - OSHA said mandatory post-accident drug testing could be deemed retaliatory
- 10/18/18 OSHA memo clarification – says it will only deem drug testing retaliatory if employer did so to penalize an employee for reporting injury

- **Memo states drug testing acceptable when it is:**
  - Random
  - Unrelated to reporting work-related injury or illness
  - Under state workers compensation law
  - Under federal law, such as US DOT rule
  - Done to find root cause of an incident

# SECRETARY v. SUNCOR ENERGY

- **2019 Review Commission case –**
  - Citation issued to refinery for subcontractor whose employee fell from unguarded work platform
  - Review Commission vacated citation
  - Suncor admitted it was controlling employer. It dictated the safety program for refinery contractors
  - Held Suncor used reasonable diligence to detect violations
  - Suncor made concerted effort to hire safety conscious contractors